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IN THE
COURT OF APPEALS OF INDIANA

KENNETH JAY RICKERD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0609-CR-765
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0512-FA-33

May 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Kenneth Jay Rickerd appeals the sentence imposed following his plea of guilty to child molesting, as a class B felony.[1]

We affirm.

ISSUE

Whether the trial court erred in sentencing Rickerd.

FACTS

In 2005, Rickerd lived in Tippecanoe County with his girlfriend, their son, and the girlfriend's then ten-year-old daughter, A.G. On or about December 1, 2005, Rickerd got into bed with A.G. and penetrated her vagina with his finger. On December 7, 2005, the State charged Rickerd with Count I, child molesting, as a class A felony; Count II, child molesting, as a class B felony; Count III, child molesting, as a class C felony; and Count IV, sexual battery, as a class D felony.

On July 12, 2006, Rickerd entered into a plea agreement with the State, whereby Rickerd agreed to plead guilty to Count II, and the State agreed to dismiss the remaining counts. The parties also agreed as follows:

> The defendant shall receive such sentence as this Court deems appropriate after hearing any evidence or argument of counsel. The defendant waives notice of aggravating circumstances and factors for sentencing purposes and waives his right to a jury to decide aggravating circumstances and factors. The defendant consents to judicial fact-finding regarding aggravating and mitigating factors to determine the appropriate sentence.

(App. 13).

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[1] Ind. Code § 35-42-4-3.

The trial court held a guilty plea hearing on July 12, 2006, and took the plea agreement under advisement. The trial court also ordered a pre-sentence investigation report ("PSI") and set a hearing for sentencing.

According to the PSI, Rickerd had been convicted of rape, a third-degree felony, in Washington County, Oregon, for which he was sentenced to three years of probation on February 1, 2002. A condition of Rickerd's probation was that he "shall not be at any residence where minor female children are residing without the prior written permission of the supervising officer." (State's Ex. 1). In June of 2002, the State of Oregon filed a petition to revoke Rickerd's probation, alleging that he had left Oregon without permission. As part of the PSI, Rickerd submitted a letter from his mother, which indicated that Rickerd had been sexually abused as a child.

On August 22, 2006, the trial court held a sentencing hearing, during which it accepted Rickerd's guilty plea. Rickerd presented the following mitigating circumstances: 1) his guilty plea; 2) remorse; 3) and that he "was also a victim of sexual abuse himself when he was a teenager." (Sentencing Hrg. Tr. 5). The trial court found the following:

> [T]he probation report accurately lists a number of aggravating factors including that the instant offense—well, including the defendant was on probation at the time that this offense was committed. That the defendant was in a position of trust over the victim. That the victim was under the age of twelve and that the defendant is a flight risk because he violated the terms of his probation in Oregon. The defendant does not have an extensive prior criminal record but it is a serious offense and . . . it's an offense in the same general category as this one . . . . [T]he defendant did plead guilty and did spare the victim the necessity of a trial, and that's deserving of some consideration. . . . [T]he fact that you yourself . . . were

> a victim in your childhood doesn't excuse the things that you do as an adult.
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> * * *
>
> [Y]ou have that conviction, you had certain requirements placed upon you and you violated those requirements and you choose to defy them. And it's fairly important in an aggravating factor that you've been ordered by the Court in Oregon not to have contact with young children without permission and . . . that's . . . the very term of probation that you violated is what put you in a position to commit this crime.

(Sentencing Hrg. Tr. 9-11). The trial court then sentenced Rickerd to fifteen years in the Department of Correction.

DECISION

Rickerd asserts that the trial court found improper aggravating circumstances. Rickerd further asserts that his sentence of fifteen years is inappropriate.[2]

Indiana Code section 35-38-1-3 provides that prior to sentencing, the trial court must conduct a sentencing hearing and make a record of the hearing, including, "if the court finds aggravating circumstances or mitigating circumstances, a statement of the court's reasons for selecting the sentence that it imposes." Thus, "[e]ven under the new statutes, an assessment of the trial court's finding and weighing of aggravators and mitigators continues to be part of our review on appeal." *McMahon v. State*, 856 N.E.2d 743, 748 (Ind. Ct. App. 2006); *Gibson v. State*, 856 N.E.2d 142, 146-47 (Ind. Ct. App. 2006) (assuming that, until the Indiana Supreme Court holds otherwise, "it is necessary to

[2] Because Rickerd committed his offense in December of 2005, Indiana's advisory sentencing scheme, which went into effect on April 25, 2005, applies. Pursuant to Indiana Code section 25-50-2-5, "[a] person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years."

assess the accuracy of a trial court's sentencing statement if . . . the trial court issued one, according to the standards developed under the 'presumptive' sentencing system . . .").[3] We therefore "merge our review of the trial court's finding and balancing of aggravators and mitigators under Indiana Code § 35-38-1-7.1 into our review for inappropriateness under Appellate Rule 7(B)." *Id.*

Here, Rickerd asserts that his sentence is inappropriate "given Rickerd's character, background, and the manner in which the aggravating circumstances were applied." Rickerd's Br. 10. We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B); *Ruiz v. State*, 818 N.E.2d 927, 928 (Ind. 2004). An examination of a defender's sentence may "include a challenge to the aggravating and mitigating circumstances found by the trial court under Indiana Code § 35-38-1-7.1." *McMahon*, 856 N.E.2d at 749.

> Therefore, if a trial court relies upon aggravating or mitigating circumstances to impose a sentence other than the advisory, it must: 1) identify all significant mitigating and aggravating circumstances; 2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and 3) articulate the court's evaluation and balancing of the circumstances.

Id. at 749-50. A review of the appropriateness of a sentence, however, is not limited "to a simple rundown of the aggravating and mitigating circumstances found by the trial

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[3] We note that in *Windhorst v. State*, 858 N.E.2d 676 (Ind. Ct. App. 2006), a panel of this court disagreed with *McMahon*'s stance that sentencing statements are required where a trial court relies on mitigating or aggravating circumstances to impose a sentence other than the advisory, contemplating that "the *McMahon* court's imposition of such a requirement will resurrect the very Sixth Amendment problems that the legislature sought to eliminate with its amendment of Indiana's sentencing scheme." 858 N.E.2d at 678 n.2. The Indiana Supreme Court, however, has granted transfer of *Windhorst*, thereby automatically vacating that opinion.

court." *Id.* at 750. Rather, we "assess the trial court's recognition or nonrecognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed . . . is inappropriate." *Gibson*, 856 N.E.2d at 142 (emphasis added).

Rickerd contends the trial court improperly cited A.G.'s age, Rickerd's probation violation, and Rickerd's position of trust as aggravating circumstances. Rickerd argues that "all of these factors [we]re improperly cited here, because they [we]re merely a perfunctory recitation of the statutory aggravators with no explanation why they justified an enhanced sentence." Rickerd's Br. 12.

> When the reviewing court finds an irregularity in a trial court sentencing determination, we have at least three courses of action: 1) "remand to the trial court for a clarification or new sentencing determination", 2) "affirm the sentence if the error is harmless", or 3) "reweigh the proper aggravating and mitigating circumstances independently at the appellate level."

Scott v. State, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006) (quoting *Cotto v. State*, 829 N.E.2d 520, 525 (Ind. 2005)), *trans. denied*.

Rickerd claims that the trial court erred in utilizing A.G.'s age as an aggravating circumstance. We agree.

Indiana Code section 35-42-4-3 provides that "[a] person who, with a child under fourteen (14) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits child molesting, a Class B felony." Because the victim's age is a material element of child molesting, the trial court could not rely solely upon A.G.'s age as an aggravating circumstance. *See Kien v. State*, 782 N.E.2d 398, 414 (Ind. Ct. App. 2003), *trans. denied*. Furthermore, since the trial court merely cited A.G.'s age, without

more, we cannot say that it "properly consider[ed] the particularized circumstances of the material elements of the crime," such as considering the victim's "tender age." *Id.*

As to the remaining aggravating circumstances cited by Rickerd, we find any error in failing to state why each was considered an aggravator to be harmless. The record clearly supports the finding of these aggravating circumstances.

Furthermore, the trial court properly considered Rickerd's criminal history as an aggravating circumstance. Although Rickerd had been convicted of only one prior offense, it was for having sexual intercourse with a minor. Thus, Rickerd's criminal history is significant. *See Stewart v. State*, 840 N.E.2d 859, 864 (Ind. Ct. App. 2006) ("The significance of a criminal history 'varies based on the gravity, nature and number of prior offenses as they relate to the current offense.'") (quoting *Wooley v. State*, 716 N.E.2d 919, 929 n.4 (Ind. 1999), *reh'g denied*), *trans. denied*. A single aggravating circumstance may be sufficient to support an enhanced sentence. *Edwards v. State*, 842 N.E.2d 849, 855 (Ind. Ct. App. 2006). We find that such is the case here.

Given the aggravating circumstances, we find Rickerd's sentence to be appropriate. As to the nature of the offense and the character of the offender, Rickerd molested A.G. while he was on probation for having raped a minor. Furthermore, Rickerd was in violation of his probation merely by residing with A.G. without permission. Accordingly, we find that Rickerd's sentence was not inappropriate in light of the nature of the offense and his character.[4]

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[4] Contrary to Rickerd's assertion, the purported sexual abuse of Rickerd does not justify a lesser sentence. *See Hines v. State*, 856 N.E.2d 1275, 1283 (Ind. Ct. App. 2006) (holding that a trial court need

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.

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not consider a defendant's difficult childhood where the defendant fails to establish its relevance to the defendant's current behavior).